UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 14 2000

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

IN RE:	)	
	)	
VITAMINS ANTITRUST LITIGATION	)	
	)	
	)	**Misc. No. 99-197 (TFH)**
THIS DOCUMENT RELATES TO:	)	
	)	
HILL'S PET NUTRITION, INC.,	)	
	)	
v.	)	
	)	
F. HOFFMAN LAROCHE, LTD, et al.	)	

MEMORANDUM OPINION

Pending before the Court is defendant Degussa-Huls' Corp. ("Degussa") Motion to Dismiss plaintiff's Kansas state law claims[1] and plaintiff's Motion to Certify Issues to the Kansas Supreme Court. Upon careful consideration of the briefs and the entire record herein, the Court will deny both motions.

I. BACKGROUND

On January 4, 2000, plaintiff Hill's Pet Nutrition Inc. ("Hill's Pet") filed in the United States District Court for the District of Kansas a three-count complaint alleging violations of (1) Section I of the Sherman Act, 15 U.S.C. § 1; (2) Kansas Antitrust Statutes, K.S.A. §§ 50-101, et seq.; and (3) civil conspiracy. This Complaint was subsequently consolidated with civil actions pending in other jurisdictions pursuant to 28 U.S.C. § 1407 and transferred to this court for pretrial proceedings.

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[1] Degussa-Huls Corporation's original motion to dismiss raised numerous additional challenges to the Hill's Pet Nutrition Complaint. However, this opinion addresses only those issues left unresolved by the Court's May 9, 2000 Memorandum Opinion and Order.

On March 21, 2000, Degussa moved to dismiss the Complaint based, in part, on its argument that Hill's Pet's claims of civil conspiracy and antitrust violations under Kansas law are barred by the applicable statutes of limitations. On May 2, 2000, Hill's Pet moved to certify two questions of law to the Kansas Supreme Court: (1) does the discovery rule apply to determine when a price-fixing conspiracy claim under the Kansas Antitrust Statutes accrues; and (2) does fraudulent concealment apply to toll the statute of limitations for an action under the Kansas Antitrust Statutes arising from a price-fixing conspiracy.

II. DISCUSSION

A. Hill's Pet's Motion to Certify

Certification is only permitted to the extent authorized by state law. Under the Kansas certification statute, issues to be certified must meet two essential conditions: (1) it must appear to the certifying court that "there is no controlling precedent in the decisions of the supreme court or court of appeals of this state"; and (2) the state law issues must be "determinative of the cause then pending in the certifying court." K.S.A. § 60-3201.

The decision of a federal court to certify questions of law pursuant to state-established procedures . . . rests with the sound discretion of the court." Tidler v. Eli Lilly & Co., 851 F.2d 418, 426 (D.C. Cir. 1987). The most important consideration guiding the exercise of this discretion is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case before it. Id. Although the certification procedure may be helpful to resolve uncertain state-law issues, it is not without its costs:

> Prudent exercise of this discretion is important. All certifying courts should be keenly aware of their obligation not to abdicate their responsibility to decide issues properly before them. They should also be keenly aware that certification involves an imposition of time and resources of the Supreme Court of [that state] and an

> increase in the expenditure of time and resources by the parties for, if certification is ordered, they must submit briefs and may be requested to make oral argument. All of this means delay in the disposition, increased costs to the parties, and increased costs in judicial resources. These factors strongly suggest that the discretion to certify should be cautiously exercised.

West American Ins. Co. v. Bank of Isle of Wight, 673 F. Supp. 760, 764 (E.D. Va. 1987). Thus, "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." Hinsdale v. City of Liberal, Kansas, 961 F.Supp. 1490, 1493 (D. Kan. 1997). In this case, the Court finds that the state of the law on these issues is not sufficiently uncertain to warrant the costs and delays associated with a grant of certification.

1. Application of Discovery Rule to Claim Under Kansas Antitrust Statutes

There is Kansas Supreme Court authority that supports the application of the discovery rule to Hill's Pet's claim under the Kansas Antitrust Statutes. In McCue v. Franklin, 131 P.2d 704 (Kan. 1942), plaintiff sued the owners of theater companies, alleging that the defendants entered into a conspiracy with film distributors to lease movies to theater companies favored by defendants at better terms than those offered to the disfavored theater. Plaintiff was the trustee of holders of bonds issued by the disfavored theater company, which had gone out of business. Although the Kansas Supreme Court did not phrase its holding in terms of what we now call the discovery rule, the court clearly applied the discovery rule to plaintiff's tort-based fraud claim as well as plaintiff's claim under the Kansas Antitrust Statutes. Specifically, the Court held that the plaintiff's claim under the Kansas Antitrust Statutes was barred because the plaintiff knew or should have known of the harm to the disfavored theater company more than three years before the suit was filed since "the closing of the [disfavored] theater was unconcealed and publicly announced." Id. at 708. Further, since the bondholders "knew or could have discovered" that the

defendants had an ownership in the disfavored theater as well as the favored theaters, the Court held that under the facts alleged, the plaintiff's antitrust cause of action accrued within the applicable limitations period and thus plaintiff was barred from bringing suit outside the three-year period. Id. In McCue, the Kansas Supreme Court did not look at when the allegedly wrongful acts occurred, but rather, it considered when the plaintiff should have been on notice of the injury to the theater. Id. Therefore, there is authority in Kansas for application of the discovery rule to claims under the Kansas Antitrust Statutes.

Degussa does not dispute that the Kansas Supreme Court in McCue applied what is now known as the discovery rule to determine when a claim under the Kansas Antitrust Statutes accrued. Instead, Degussa argues that the Court's application of the discovery rule is not precedential because it was unnecessary to the result since application of the accrual rule would have yielded the same result in that case. Therefore, Degussa contends, McCue can be read to mean only that the "plaintiff's 'discovery' of the facts underlying his antitrust claim was sufficient to start the statute [of limitations] running", but was not "necessary to start the statute running." Degussa Reply and Opposition at 5. The Court finds this interpretation to be without merit. Degussa's argument is premised on the fact that in McCue, the injury and the discovery of the facts underlying that injury were found by the Court to have occurred at the same time. If the Kansas Supreme Court viewed the date of injury as the appropriate accrual rule, the Court could simply have resolved the case on that ground; there would have been no need to discuss the plaintiff's discovery of that injury. This Court is unwilling to assume that the Kansas Supreme Court applied the discovery rule in McCue even though it was a wholly superfluous gesture, both misleading and entirely unnecessary to the result. It makes far more sense to assume that the Court focused on when the plaintiff could reasonably have discovered the injury, because it was

applying the discovery rule to the facts of that case. Although McCue is far from recent, the Court finds it significant that the case is still good law and in all these years has not been overruled or abrogated by any subsequent Kansas authorities.

In addition to McCue, other decisions applying Kansas law support application of the discovery rule to statutory claims, particularly where the conduct underlying those claims has a fraudulent component and the statute at issue is a remedial one. See Kelly v. Primeline Advisory, Inc., 889 P.2d 130 (Kan. 1995) (applying discovery rule to claims under Kansas Securities Act); Rubin v. Riffe Homes, Inc., 1999 WL 588182 (D. Kan. July 26, 1999) (applying discovery rule to claims under the Kansas Consumer Protection Act). Degussa argues that these cases do not resolve the certification issue here because, in each case cited by Hill's Pet, a fraud-based component underlies the statutory claims. However, a close reading of these decisions indicates that the fraud-based component of those statutory claims was relevant precisely because such conduct tended to conceal plaintiff's injury, making application of the discovery rule appropriate. See, e.g. United Cities Gas Co. v. Brock Exploration Co., 984 F. Supp. 1379, 1387 (D. Kan. 1997) (rejecting application of the discovery rule to plaintiff's claims under the Kansas Public Utilities Act but noting that application of the discovery rule to claims with a fraudulent component, such as was done in Kelly, is highly appropriate, because the injuries and acts causing the injuries are "highly difficult to detect.") In United Cities, the Court found it significant that plaintiff had not presented any evidence that the defendants had "ever misrepresented the nature of their activities or inflicted damages that could not be detected immediately through the exercise of reasonable diligence." Id. at 1388. The Court also distinguished another federal decision that had applied a continuing violation accrual rule on the grounds that the allegations in the latter case were "permeated with fraudulent concealment,"

whereas the case before the United Cities Court contained no allegations of "fraud, misrepresentation, or concealment. . . ." Id. at 1389. Therefore, this Court finds that Kansas law supports plaintiff's contention that fraud-based conduct is relevant to the discovery rule, not in and of itself, but because such conduct tends to conceal from the plaintiff that it has suffered injury or that defendant's activities have caused such injury. In this case, Hill's Pet has sufficiently alleged facts showing affirmative acts of concealment to trigger application of the discovery rule to its claim under the Kansas Antitrust Statutes. See Complaint ¶¶ 147-49, 157. Accordingly, the Court finds it unnecessary to certify this issue to the Kansas Supreme Court.

2. Application of Fraudulent Concealment to Action Under Kansas Antitrust Statutes

Even if the discovery rule were not applicable, the doctrine of fraudulent concealment could be used to toll the three-year statute of limitations governing Hill's Pet's state antitrust claim. While it is true that Kansas state courts have not directly addressed the application of fraudulent concealment under the Kansas Antitrust Statutes and Degussa is correct that older decisions of Kansas courts construing different types of claims have held that fraudulent concealment applies only to claims sounding in fraud, see McCoy v. Wesley Hosp. And Nurse Training School, 362 P.2d 841 (Kan. 1961), more recent decisions suggest that this rule has been eroded and that fraudulent concealment now applies to claims that do not sound in fraud. For example, in Baker v. Board of Regents of the State of Kansas, 991 F.2d 628 (10th Cir. 1993), the Tenth Circuit applied fraudulent concealment in connection with a statutory civil rights claim for violation of 42 U.S.C. §§ 1981 and 2000d. The Tenth Circuit held that, although previously Kansas law would have prevented the application of the fraudulent concealment doctrine to plaintiff's statutory civil rights claim because it did not sound in fraud, the law of Kansas had changed and fraudulent concealment was now applicable to plaintiff's statutory claim. Baker,

991 F.2d at 633. Specifically, the Court stated that:

> In Pike [v. City of Mission, 731 F.2d 655 (10th Cir. 1984)], we stated that 'under Kansas law, fraudulent concealment does not toll the statute of limitations unless the plaintiff's claim for relief is grounded in fraud.' [citations omitted]. However, that statement of the law no longer appears to be true. Now, under Kansas law, in order 'to constitute concealment of a cause of action within the general rule tolling that statute of limitations, . . . there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action.' [citations omitted].

991 F.2d at 633 (emphasis added). The Tenth Circuit noted that this fraudulent concealment standard is similar to that applied by the Tenth Circuit for equitable tolling under federal principles of fraudulent concealment. "The appellant must show that his ignorance was not the result of his lack of diligence, but was due to affirmative acts or active deception by the appellant to conceal the facts giving rise to the claim." Id. at 633 n.4. The Baker decision thus supports application of fraudulent concealment to claims other than those sounding in fraud.

The case upon which the Tenth Circuit relied in Baker was the decision of the Kansas Supreme Court in Friends University v. W.R. Grace & Co., 608 P.2d 936 (Kan. 1980). In that case, plaintiff brought an action against the manufacturer of allegedly defective roofing materials. On appeal, the court considered whether fraudulent concealment would operate to toll plaintiff's negligence claims. Although the Kansas Supreme Court in Friends did not explicitly adopt fraudulent concealment as a tolling mechanism for plaintiff's negligence claims because it found that plaintiff had become aware of sufficient facts to discern its cause of action more than two years before filing the action and therefore had not set forth a basis for finding fraudulent concealment, that court did imply that fraudulent concealment would apply under the proper circumstances. "To constitute concealment of a cause of action within the general rule tolling the statute of limitations on that ground, the concealment must be fraudulent or intentional and, in

the absence of a fiduciary or confidential relationship, there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. . . . Although mere silence or failure to disclose may not in itself constitute fraudulent concealment, any statement, word, or act which tends to the suppression of the truth renders the concealment fraudulent." Friends, 608 P.2d at 941. Thus, there is some authority in Kansas for the proposition that fraudulent concealment will be applied, even in actions not sounding in fraud, where there was "a design to prevent the discovery of the facts which gave rise to the action" and where "the act operated as a means of concealment." Id.

Degussa argues that the decision in Bonin v. Vannaman, 929 P.2d 754 (Kan. 1996), clearly establishes that, under Kansas law, fraudulent concealment applies only to claims sounding in fraud. However, in Bonin, the Kansas Supreme Court, addressing the application of fraudulent concealment to a statute of repose in a medical malpractice context, concluded that, even if fraudulent concealment applied to toll a statute of repose, its application was inappropriate because plaintiff had not pled any allegations of fraudulent conduct but rather had merely pled negligence. The Court did not address, and thus cannot be said to have overruled, its earlier decision in Friends, which has been relied upon by subsequent Tenth Circuit decisions in which the courts have recognized the application of fraudulent concealment to claims not sounding in fraud. City of Witchita v. United States Gypsum Co., 72 F.3d 1491 (10th Cir. 1996); Baker v. Board of Regents of the State of Kansas, 991 F.2d 628 (10th Cir. 1993). Thus, this Court finds that although Kansas law originally limited the application of fraudulent concealment to claims sounding in fraud, more recent Kansas decisions have expanded the scope of the fraudulent concealment doctrine. These more recent decisions support application of fraudulent concealment to Hill's Pet's claims under the Kansas Antitrust Statutes. Accordingly, this Court

finds no reason to certify this issue to the Kansas Supreme Court.

B. Degussa's Motion to Dismiss

Having concluded that the discovery rule and, alternatively, the doctrine of fraudulent concealment are applicable to Hill's Pet's claim under the Kansas Antitrust Statutes, this Court must now consider whether the allegations stated in plaintiff's complaint are sufficient to survive a motion to dismiss.[2]

A complaint may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [the complaint] which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court must accept the allegations of the complaint as true, and draw all reasonable inferences in the plaintiff's favor. Croixland Properties Ltd. Partnership v. Corcoran, 174 F.3d 213, 215 (D.C. Cir.), cert denied, 120 S.Ct. 53 (1999). This rule is particularly significant in antitrust cases, where the proof is largely in the hands of the alleged conspirators. Hospital Bldg. Co. v. Trustees of the Rex Hosp., 425 U.S. 738, 744 (1976), cert denied, 464 U.S. 904 (1983).

Degussa argues that Hill's Pet may only recover damages under its civil conspiracy claim for "violations accruing" within two years of filing of plaintiff's complaint and under its Kansas antitrust claim for violations of the Kansas Antitrust Statutes "accruing more than three years ago." Degussa Mem. at 34.

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[2] This opinion addresses only the adequacy of plaintiff's allegations in count two (violations of the Kansas Antitrust Statutes) and count three (civil conspiracy). The Court's May 9, 2000 memorandum opinion and order has rendered defendant's motion moot with respect to the adequacy of plaintiff's allegations in count one (violations of Section 1 of the Sherman Act).

1. Civil Conspiracy Claim

Under Kansas law, conspiracy claims are governed by the same two-year statute of limitations that governs fraud claims. K.S.A. § 60-513(a)(4). The two-year statute of limitations begins to run only when "the act giving rise to the cause of action first causes substantial injury, or if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. § 60-513(b); see also Masters v. Daniel Int'l Corp., 1992 WL 40537 *3 (D. Kan. 1992). Therefore, a plaintiff may bring a civil conspiracy claim if the alleged overt acts injured it, and the fact of injury from those acts, was not reasonably ascertainable until at most two years before the filing of plaintiff's complaint. Id.; see also McLoughlin v. Golf Course Superintendents Assoc. of America, 1990 WL 129204 at *14 (D. Kan. 1990).

The issue of when the statute of limitations on plaintiff's conspiracy claim began to run is essentially a factual question; the factfinder must determine when the plaintiff knew or reasonably should have known of the injury or acts giving rise to its claims. See, e.g., Monarch Normandy Square Partners v. Normandy Square Assoc. Ltd. Partnership, 817 F. Supp. 908, 916-17 (D. Kan. 1993) (denying summary judgment to defendant because issues of fact precluded determination of when statute of limitations began to run on fraud and civil conspiracy claims); Hess v. Fuller, 1990 WL 37608 (D. Kan. 1990) (denying motion for summary judgment on defendant's limitations defense to claims for fraud and civil conspiracy). A plaintiff is deemed to have discovered such claims when, through reasonable diligence, he could have learned of the acts or conduct giving rise to its injuries. Schrag v. Dinges, 788 F. Supp. 1543, 1549 (D. Kan. 1992).

In this case, Hill's Pet has alleged that it "did not discover and could not discover,

through the exercise of reasonable diligence, the existence of the claims alleged herein until recently because defendants and their co-conspirators affirmatively, intentionally, wrongfully, and fraudulently concealed the existence of their conspiratorial conduct from plaintiff." Complaint at ¶ 147. Plaintiff further alleges that defendants and their co-conspirators affirmatively concealed their conspiratorial conduct by keeping documents to a minimum and destroying them after each meeting, instructing defendants' personnel to destroy all documents that might be evidence of illegal agreements with competitors, listing companies by code number to conceal their true identities, attending covert meetings, intentionally submitting false bids, bribing witnesses to keep silent, instructing members of the conspiracy not to divulge the existence of the conspiracy to others not in the conspiracy, confining the anticompetitive plan to a small number of people at each company, conducting covert telephone calls and meetings, publicly misrepresenting the reasons for the price increases, and falsely denying to the United States Department of Justice the existence of the conspiracy and meetings and other action taken in furtherance of the conspiracy when defendants had a duty to disclose such information. Complaint ¶¶ 148-149. These allegations are expressly incorporated into plaintiff's civil conspiracy claim, see id. ¶ 161, and are sufficiently detailed to survive a motion to dismiss. Accordingly, it will be up to a trier of fact to determine whether Hill's Pet could reasonably have been aware of its injury more than two years before filing its Complaint and thus whether or not Hill's Pet's civil conspiracy claim accrued within two years of filing of its Complaint.

2. Violations of the Kansas Antitrust Statutes

Hill's Pet's claims under the Kansas Antitrust Statutes are governed by the three-year statute of limitations set forth in the general Kansas statutes. Specifically, Section 60-512 of the Kansas statutes provides that "[t]he following actions shall be brought within three (3) years . . .

(2) an action upon a liability created by statute other than a penalty or forfeiture." K.S.A. § 60-512. The statute does not specify when a statutory cause of action accrues or whether the discovery rule applies. As discussed above[3], this Court finds that Kansas Supreme Court authority supports the application of the discovery rule to Hill's Kansas antitrust claim. See McCue, 131 P.2d at 708. Applying the discovery rule[4], Hill's Pet's conspiracy claims under the Kansas Antitrust Statutes did not accrue until recently. See Complaint at ¶¶ 147-49. Assuming these allegations are true, as this Court must when resolving a motion to dismiss, the Court must deny Degussa's motion seeking dismissal of all claims for damages suffered more than three years prior to filing this action. The issue of when the fact of Hill's Pet's injury was reasonably ascertainable and thus when its claim for those damages under the Kansas Antitrust Statutes and the common law of civil conspiracy accrued is an issue of fact that cannot be resolved at this stage in the pleadings.

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3 See discussion of discovery rule under section entitled "Hill's Pet's motion to Certify."

4 As discussed above in the section entitled "Hill's Pet's Motion to Certify," this Court also holds that even if the discovery rule did not apply, the doctrine of fraudulent concealment would be applicable because recent Kansas court decisions suggest that Kansas's fraudulent concealment doctrine has been expanded to claims that do not sound in fraud. See Friends, 608 P.2d at 936; see also Baker, 991 F.2d at 633; City of Wichita, 72 F.3d at 1499. The Court finds the allegations in paragraphs 147 through 149 of Hill's Pet's Complaint adequate to state a claim under the doctrine of fraudulent concealment.

IV. CONCLUSION

For the foregoing reasons, the Court will deny both Degussa's motion to dismiss and Hill's Pet's Motion to Certify. An order will accompany this Opinion.

July 14th, 2000

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ORDER

In accordance with the accompanying memorandum opinion, it is hereby

ORDERED that Hill's Pet Nutrition, Inc.'s Motion to Certify Issues to the Kansas Supreme Court is **DENIED**. It is further hereby

ORDERED that defendant Degussa-Huls' Corp.'s Motion to Dismiss is **DENIED**.

July 14, 2000

Thomas F. Hogan
United States District Judge

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